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No. 03-165

In the Supreme Court of the United States

GENERAL MOTORS CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The government's brief opposing the petition for certiorari is striking in what it does *not* say. It does not defend the Federal Circuit's actual holdings on the administrative law issues presented in the petition; makes no attempt to distinguish most of the decisions of this and other courts that conflict with those holdings; does not take issue with the proposition that the Federal Circuit in this case continued its pattern of departing from basic rules governing agency deference; and does not deny that the issues presented are recurring ones of great significance. At the same time, the government's discussion of the meaning of 1978 CAS 413 suffers from a similar omission: the United States does not defend the analysis used by the court of appeals in construing CAS 413, does not deny that unreviewed decisions of the Federal Circuit become, in effect, the law of the land – and *does* offer a substitute approach that is internally inconsistent and manifestly wrong. In these circumstances, further review of the decision below plainly is warranted.

A. The Federal Circuit's Ruling That It Had No Obligation To Defer To The Views Of The CASB And To The Longstanding Practice Of The Department Of Defense Conflicts With Decisions Of This Court And Other Courts Of Appeals.

1. We showed in the petition that the Federal Circuit declined to defer to the CASB's views on the meaning of 1978 CAS 413 because those views assertedly (1) "were not published by the Board to aid the interpretation of CAS 413"; (2) "were written at least nine months after the promulgation of CAS 413"; and (3) were expressed by the CASB Associate Director, Bernard Sacks, who was "only a staff member." See Pet. 13-14. In its brief, the government does not attempt to defend – indeed, it fails even to acknowledge – the first two of these rationales. As to the third, the government as-

serts that "there was no evidence that Mr. Sacks's opinions reflected the Board's interpretation of 1978 CAS 413." U.S. Br. 9. See also Allegheny Teledyne Br. 18-19. But that was not the basis for the Federal Circuit's holding. It hardly could have been: the court of appeals acknowledged both that Mr. Sacks was "the primary drafter of CAS 413" and that he was "the Board's 'point man' for dealing with requests for clarification of CAS 413 by entities that had to comply with the standard." Pet. App. 15a.[1]

The government's reluctance to defend the Federal Circuit's holdings on their own terms, and its unwillingness to deny that those holdings conflict with the decisions of other courts, is understandable; the United States has a serious "sauce for the gander" problem. It is the government, of course, that routinely argues – successfully – that courts must defer to agency interpretations that are offered under far less formal circumstances, and by far "lower level" personnel, than those at issue here. The government did so, for example, in the many cases of this Court and other courts of appeals that are cited in the petition at 15-16.[2] The United

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[1] The United States also asserts that the court of appeals declined to defer to the views expressed by Mr. Sacks because they were "vague." U.S. Br. 9. As we note in the petition (at 14 n. 5), however, that conclusory characterization was made by the court in passing and did not detract from the central elements of its holding. In fact, there was no ambiguity in Mr. Sacks's expressed view that 1978 CAS 413 did not distinguish between fixed-price and other types of contracts. See Pet. 13.

[2] We would be very surprised if the United States really meant to contend that the views of a high-level agency employee, who drafted the regulation at issue and who was specifically charged with responding to requests for clarification regarding that regulation, are not entitled to any deference at all (even of the *Skidmore* kind) on the meaning of that regulation. That certainly was not the Court's holding in *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 743 (1996), cited at U.S. Br. 10. The Court there indicated that a

States does not attempt to, and could not, distinguish those decisions from the ruling below. For that reason alone, further review is warranted.[3]

2. The United States exhibits a similar lack of enthusiasm for the Federal Circuit's holding that the views of the agency responsible for implementing a regulation are not entitled to deference. See Pet. 17-19. As we explained in the petition, the Federal Circuit recognized that, "until this litigation began in 1999" (Pet. App. 16a), the Department of Defense had "consistently applied CAS 413" to require the recovery of a surplus or deficit in pension expenses under fixed price contracts. *Id.* at 17a. The court nevertheless refused to defer to DOD's longstanding approach because, in its view, "only the interpretation of the agency that promulgated the regulation matters." *Ibid.* As noted in the petition, that holding cannot be reconciled with the rule of *Bragdon* v. *Abbott*, 524 U.S. 624 (1998), and the United States makes no attempt to defend it.

Instead, the United States makes the very different contention that "[t]he *current* DoD view, to which any due deference would be directed, is that pre-1995 fixed-price contracts are *not* to be considered in determining the segment-closing pension/surplus deficit adjustment." U.S. Br. 11 (second emphasis in original). This proposition, even if

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letter from an agency Deputy Chief Counsel could not be thought to establish "prior agency policy" when the letter was inconsistent both with the currently controlling regulation and with the contemporaneous views expressed by the head of the agency. There is no such inconsistency here.

[3] In its brief in opposition to the petition (at 10-11, 14-17, 19-20), Allegheny Teledyne argues that deference is inappropriate because Mr. Sacks's views were inconsistent with the plain language of the regulation. It is perhaps enough to note in response that this improbable argument is not advanced by the United States and was not relied upon by the Federal Circuit.

accurate, would not justify leaving in place a glaringly erroneous holding regarding a recurring and important issue of administrative law. But beyond that, the government is wrong even on its own terms. The DOD's *new* view, as a sharp and unexplained departure from prior practice, should get no deference at all. See, *e.g.*, *Pauley* v. *Bethenergy Mines, Inc.*, 501 U.S. 680, 698 (1991); *Akzo Nobel Salt, Inc.* v. *Federal Mine Safety and Health Review Comm'n*, 212 F.3d 1301, 1304-05 (D.C. Cir. 2000). And because the DOD offered no explanation for its switch in position, its prior, longstanding interpretation of 1978 CAS 413 should be regarded as authoritative. Cf. *Paralyzed Veterans of Am.* v. *D.C. Arena, L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) (prior regulation remains in place when agency attempts to modify it without using notice-and-comment procedures), cert. denied sub nom. *Pollin* v. *Paralyzed Veterans of Am.*, 523 U.S. 1003 (1998). The Federal Circuit's refusal to defer to that interpretation is indefensible.[4]

B. The Federal Circuit's Interpretation Of 1978 CAS 413 Is Incorrect And Warrants Review

When the United States defends the Federal Circuit's analysis of 1978 CAS 413, it again abandons the court of appeals' rationale. The United States thus contends that the key to the case is the difference between *allocation* of costs – assertedly the only subject that is addressed by 1978 CAS 413 and that is within the CASB's purview – and *allowability* of costs. U.S. Br. 7-8; see also Allegheny Teledyne Br. 5-7. But that was not the basis for the court of appeals' decision. The Federal Circuit made no mention whatsoever of any distinc-

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[4] The United States also contends that the DOD did not have a longstanding and consistent approach prior to 1999. U.S. Br. 11 n.3; see also Allegheny Teledyne Br. 21-22. On that, the record speaks for itself. See, *e.g.*, Pet. App. 17a. For present purposes, it is dispositive that the Federal Circuit, although presented with this argument (see *id.* at 16a), did not accept it. See *id.* at 17a-18a.

tion between allocability and allowability as a basis for any of its holdings; instead, it simply read 1978 CAS 413 not to apply to fixed price contracts. See Pet. App. 13a-20a.[5]

In fact, the government's position is internally incoherent. The government *concedes* that, under the *1995* version of CAS 413, "the government's share of a segment-closing pension cost adjustment is based in part upon pension costs that are attributable to fixed-price contracts." U.S. Br. 8. The government therefore plainly must be wrong in asserting that CASB rules in general, and CAS 413 in particular, cannot answer the question whether fixed price contracts are to be included in calculating the pension adjustment that must be made when a segment is closed. The government's case accordingly must turn on there being a fundamental difference between 1995 CAS 413 and 1978 CAS 413. But because 1995 CAS 413 expressly provides that it is "not intended to create[] rights" (1995 CAS 413.64(c)) – and because the operative language of the 1978 and 1995 versions of CAS 413 is *identical* – the government's concession that 1995 CAS 413 takes account of fixed-price contracts is fatal to its position. See Pet. 26-27.[6]

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[5] Actually, there is no issue of "allowablity" of pension costs in this case. The question here is how to make a CAS-mandated segment closing pension adjustment, and whether to include pension costs that previously were allocated to government fixed-price contracts in the adjustment. There is no dispute that pension costs are an "allowable" cost under the CAS and FAR cost principles.

[6] The United States (at Br. 8) and Allegheny Teledyne (at Br. 22-23) argue that the inclusion of transition rules in 1995 CAS 413 evidences an intent to enact a new substantive standard. For reasons explained in the petition (at 26-27), however, those rules cannot be taken to make a fundamental change in the segment closing provision – particularly given the CASB's express declaration that it did *not* mean to create new rights. The government also states (at Br. 8) that the new rules created the need for conforming changes to the applicable FAR, but those FAR changes were not

In making this argument in the petition, we did not suggest, as the United States would have it, that "the government is acting unfairly by attempting to change its position based upon whether a contractor has a segment closing surplus or deficit." U.S. Br. 9. We made a different point: that the Department of Justice consistently took the position in litigation, both before and after the 1995 CAS revision, that 1978 CAS 413 does apply to fixed-price contracts – and that the Department took that position *in this very case* as recently as July 2000. The government notably does not contend that we are wrong on that score; does not spell out how the Department of Justice came to change its view; and does not explain why, in light of its switch in position, its current approach should be thought credible.

C. The Federal Circuit's Interpretation Of 1978 CAS 413 Involves An Issue Of Substantial Importance

Finally, the government is wrong in the miscellany of additional arguments it advances against certiorari. *First*, the government maintains that the accounting issue presented here has no continuing importance because 1978 CAS 413 has been superseded. U.S. Br. 12. As we explain in the petition, however, in addition to governing all segment closings that occurred prior to the effective date of 1995 CAS 413, the Federal Circuit's holding will have significance whenever the calculation of future pension adjustments makes use of pre-1995 contracts. See Pet. 21-22 n.10. The government does not deny that this consideration gives the case significant and continuing practical importance – over and above the sub-

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addressed to the allowability of segment closing adjustments. See Pet. App. 76a-78a. And the government misspeaks when it says (at Br. 9) that the CASB in 1995 "defend[ed] the rationale for the change" to a rule that reached fixed-price contracts; although the CASB indeed did defend the inclusion of fixed-price contracts in the 1995 CAS 413 calculation, it nowhere suggested that this was a change from the prior rule See Pet. App. 75a.

stantial sums at stake in the currently ongoing cases identified by the government itself at U.S. Br. 12, and wholly apart from the recurring issues of administrative law also presented in the petition.

Second, the government asserts that review is inappropriate because the case is in an interlocutory posture. U.S. Br. 12. But the issue decided below is of central importance in determining the course of the litigation. For that reason, the trial court sua sponte certified the case for interlocutory appeal. And the issue regarding the meaning of 1978 CAS 413 will not disappear or change its character as the case progresses. In such circumstances, interlocutory review by this Court plainly is appropriate. See, *e.g.*, *Mazurek* v. *Armstrong*, 520 U.S. 968, 975-976 (1997); *Central Bank* v. *First Interstate Bank*, 511 U.S. 164 (1994); *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945); R. Stern, E. Gressman, S. Shapiro, & K. Geller, SUPREME COURT PRACTICE 259-260 (8th ed. 2002).

Third, the government disputes the amount at stake in this phase of the litigation, observing that, if it prevails on all of its other arguments, $293 million of GM's $311 million claim will be disallowed. See U.S. Br. 12-13. Of course, that still leaves some tens of millions of dollars at issue. In any event, while the government accurately quantifies the value of *all* the issues in dispute, it fails to note that the issues in the current phase of the litigation are *themselves* valued at more than $200 million, before considering the unrelated questions that remain to be resolved. The practical significance of the case therefore cannot be disputed.

Fourth, the government tries to dissuade the Court from taking the case by characterizing the issues presented here as "highly technical." U.S. Br. 6. But the questions presented are straightforward, easy to grasp, and important. Had the court below deferred either to the relevant CASB interpretation or to longstanding DOD practice, it would have ruled for

GM. The government does not contend otherwise. At the same time, the Federal Circuit's failure to acknowledge controlling principles of agency deference departed from the decisions of this Court and of other courts of appeals – and, again, the government does not contend otherwise. The Court should grant review to correct that error.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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